BEFORE THE CITY OF SEATTLE
ETHICS AND ELECTIONS COMMISSION

IN THE MATTER OF COMPLIANCE WITH SMC 2.04.300 CITY OF SEATTLE	) RENEWED REQUEST THAT THE ETHICS AND) ELECTIONS COMMISSION ISSUE AN) ADVISORY OPINION ON AGENCIES' AND) OFFICIALS'PRACTICES REGARDING BALLOT) MEASURES; AND REQUEST THAT IT REQUIRE) COMMISSION STAFF TO RECORD AND) ARCHIVE ITS MEETINGS AND PHONE) CONVERSATIONS,AND ARCHIVE ITS E-) MAILS, WITH CITY OFFICIALS REGARDING) SPECIFIC BALLOT MEASURES

This document renews my 2012 request of the Ethics and Elections Commission that it issue an advisory opinion about agencies' and officials' practices regarding ballot measures. It also requests that the Commission instruct its staff to record and archive the audio of any meetings and phone conversations they have with City agencies and officials, and archive their e-mails, about their practices regarding specific ballot measures before or after they have been placed on the ballot.

I. LEGAL BACKGROUND AND STANDING

I am making the first part of my request under Rule 5 of the Ethics and Elections Commission's administrative rules. The entirety of the rule is as follows:

Rule 5 on Advisory Opinions

A. Any person subject to or affected by the Commission-administered ordinances may request a written advisory opinion. The request

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should be in writing and should explain all the pertinent facts and circumstances. Advisory opinions are intended to assist the person seeking advice and to guide future conduct. The Commission retains sole discretion to determine in which cases it will issue an advisory opinion. Factors the Commission may consider when determining whether to issue an opinion include, but are not limited to, whether the issue presented is one of general application, one that has not recently been addressed by the Commission, or one that is likely to be the subject of controversy or dispute. Abstracts of Commission opinions or the full text of Commission opinions are available on the Commission's web site.

B. The Commission shall consider draft Commission opinions prepared by the Executive Director as soon as is practicable. The Commission may decline to issue the advisory opinion or, by vote, approve or modify the opinion.

C. Advisory opinions issued by the Commission shall be designated as follows: Advisory Opinion [year - number].

I am subject to the City ordinance prohibiting the use of public resources in promoting ballot measures because I serve on a City advisory committee (the Lake Union District Council). I am also affected by the ordinance because as a voter I want my own information about ballot measures and that provided to other voters to be free of illegal influence by City agencies; and because as a taxpayer I want the election result to be free of the illegal use of City resources and facilities.

In my July 3, 2012 complaint about campaign practices by the City Library regarding the 2012 Library Levy, and in other documents filed with the commission and oral comments made to the Commission, I requested that the Ethics and Elections Commission develop an advisory opinion about the campaign practices of City agencies and officials regarding ballot measures. To my knowledge, the Commission has never discussed my request. Perhaps it was my mistake in not couching my

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request in the context of the Commission's administrative rule 5, but I am now renewing my request, this time under that rule.

II. REASONS WHY A NEW ADVISORY OPINION IS NEEDED

I suggest several reasons for the Commission to adopt an advisory ruling on agency and officials' activities regarding ballot measures. First, existing guidance in the form of laws, rules, and rulings is somewhat confusing and contradictory. Second, ballot measure are frequent and becoming more frequent, especially that propose the raising of additional revenues. Third, ballot measures for revenues are particularly tempting to agencies and officials to skirt or violate the state and Seattle laws against use of public resources to influence the voters; but the guidance on this topic from a 2006 Commission advisory opinion is particularly wanting.

Without the requested advisory opinion, the Commission, agencies and officials, and the public are forced to rely on the 2006 supplemental advisory opinion that the Commission issued in the case of Mayor Nickels. This advisory opinion was a valuable effort by the Commission to navigate the somewhat confusing and contradictory laws, rules, and rulings regarding what an incumbent elected official can and cannot do with City resources on behalf of his or her re-election. However, that advisory opinion confines itself to issues raised by an incumbent candidacy. It is of real but also of quite limited value in addressing the issues posed for agencies and officials in what is and is not permitted in their use of public resources regarding a ballot measure (especially one that seeks to raise revenues).

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An example of an important topic about ballot measures that is inherently missing from the 2006 advisory opinion, given its focus on an incumbent candidate, is how, during a ballot measure campaign, to address advocacy information that the agency developed in the period prior to the decision to place the ballot measure before the voters. The legal restrictions on agency advocacy and honesty are much less before a ballot measure is proposed to the voters than they are after the decision has been made to put it on the ballot. Agency advocacy and dishonest agency claims that are clearly illegal during a campaign may legally be developed in the run-up to putting the ballot measure on the ballot. But the Ethics and Elections Commission has issued no guidance on what to do with this earlier produced material once a decision has been made to place the measure on the ballot.

By default (lacking an advisory opinion), the Commission seems to be tolerating virtually all of this prior produced material being used during the campaign to influence the voters, as it is kept prominently on agency web sites and/or in agency facilities frequented by the public. As a result, agencies have every incentive, prior to the decision to put a measure before the voters, to spend large resources develop marketing materials clearly designed to influence those voters during the eventual campaign. Indeed, during the campaign these sophisticated materials are influencing voters (apparently from the Commission's inaction legally so) even though they would have been illegal to produce during the campaign. It is long past time for the Ethics and Elections Commission to engage the public in developing a

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more reasonable policy on this topic that better serves the laws of Seattle and the state. The best place to do that is as part of an advisory opinion on agencies' and officials' activities regarding ballot measures.

There is a further reason why the 2006 supplementary advisory opinion in the Nickels case is of limited value regarding ballot measure campaigns, namely that it unfortunately adopted one policy that I suggest was an error that the Commission should revisit and, I hope correct. This error is the position capsulized in the following sentence (pp. 3-4), quoting:

> The key question is whether, to a reasonable person, the activity or document appears PRIMARILY designed to influence the outcome of an election, or PRIMARILY designed to be informational with only an incidental effect of assisting a candidate's campaign for election.

The problem with that sentence in the Commission's 2006 supplementary advisory opinion is that it would countenance agency activity that, in violation of City and law, is designed to influence the outcome of the election. Contrary to that sentence, the Commission must find that even if it believes that an agency's mentions of a ballot measure are "primarily informational," any use by that agency of public resources to influence the voters is plainly illegal. For the Commission to rule otherwise would give agencies a blank check to use public resources to influence voters on how to vote on a ballot measure simply by surrounding these efforts with a higher volume of non-advocacy information. The Commission must depart from the above-mentioned sentence in its 2006 advisory opinion that justifies clear efforts,

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otherwise prohibited by state and Seattle law, by an agency to promote a ballot measure.

WAC 390-05-271(2) requires that any agency's effort to communicate to the public about a ballot measure must ensure an "objective and fair presentation of facts." But contrary to that clear requirement, with the earlier quoted sentence still out there in the 2006 supplementary advisory opinion in the Nickels case, the Commission is in a position of countenancing efforts by agencies and officials to engage in less than an "objective and fair presentation of facts" to influence ballot measure campaigns. The need for correction of this small but serious flaw in the 2006 supplementary advisory opinion is a particularly important and urgent reason for the Commission to develop an advisory opinion specifically about agencies' and officials' activities regarding ballot measures.

III. REQUEST THAT THE COMMISSION INSTRUCT ITS STAFF TO AUDIO RECORD AND ARCHIVE ITS CONFERENCES WITH AGENCIES ABOUT BALLOT MEASURES, AND TO PERMANENTLY ARCHIVE WRITTEN COMMUNICATIONS ON THAT TOPIC

As an interim improvement, I suggest that the Ethics and Elections Commission instruct its staff to audio record and archive its meetings and telephone conferences with City agencies and officials regarding ballot measures both before and campaigns; and to permanently archive its written communications with City agencies and officials regarding ballot measures both before and during campaigns.

Too often, guidance given by the Commission staff is being cited by agencies as a rationale for their engaging in some questionable activities, but the public learns about these activities too late to

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file a complaint that, if the Commission were to agree with the complaint, could have had a meaningful impact in preventing the abuse. Also, the Commission staff naturally become personally invested in a particular interpretation of the law if they have already told it to an agency or official. As the Commission's complaint process gives substantial weight to the Executive Director's finding, it is more difficult for the public to obtain a reasonable ruling from the Commission later in the process than if the staff interpretation had been made known to the public and to the Commission earlier in the process so that it could be addressed before the staff position became entrenched. The public and the Commission alike deserve to know how the authority of the Commission is being used by staff to justify certain practices that may be worthy of being the subject of a complaint to, or ruling or advisory opinion by the Commission.

Written messages exchanged between the inquiring agencies and the Commission staff are public records, but unfortunately the City of Seattle policy is to automatically delete e-mails after 60 days unless they are expressly archived. E-mails between agencies and Commission staff about potential agency misuse of public resources in a ballot campaign are too important not to be saved permanently, or at least for several years. In the public interest, the Commission should direct that such e-mails be archived.

IV. CONCLUSION

I appreciated the chance to speak to the Commission about at least some of the above topics in 2012 and again all too briefly at the

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Commission's May 7, 2014 meeting. I request that the Commission discuss these requests at a meeting soon, and that it do all it can to improve its processes for addressing agency and official activities regarding ballot measures. I regret that two years have been lost in making these necessary reforms, as serious abuses are again emerging, this time in the run-up to the August 5 vote on Proposition One. These abuses could have been prevented or reduced if the current disarray in guidance were better addressed. Without prompt and forthright action by the Commission, such agency behavior is only encouraged and made more likely in the future. Thank you for your consideration.

I declare under penalty of perjury of the laws of the State of Washington that I am a registered voter of the City of Seattle, and that the information in the above complaint, and the exhibits provided, are true and correct.

Dated this May 22, 2014

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